Federal Communications Commission
Washington, D.C. 20554

March 7, 1995

92-297

Mr. J. Robert Giddings
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

Dear Mr. Giddings:

Your letter of January 9, 1995 to Chairman Reed E. Hundt concerning the LMDS 28 GHz rulemaking proceeding, CC Docket No. 92-297, has been referred to this office for reply. In your letter you repeat the University of Texas System's request that Chairman Hundt recuse himself from the LMDS rulemaking proceeding because of the involvement of Hughes Space and Communications (Hughes) and Latham & Watkins, citing the Chairman's recusal in a recent Direct Broadcasting Satellite (DBS) rulemaking proceeding.

As previously called to your attention, Office of Government Ethics regulations do not generally contemplate that an employee consider recusal from general rulemakings because a former employer or client is a commenter. Because of circumstances unique to the DBS proceeding, however, the Chairman, as a matter of his own discretion, did recuse himself from that rulemaking proceeding. His recusal was not, however, grounded on the fact that Hughes or Latham & Watkins was a participant in the rulemaking. Rather, he did so because, while at Latham & Watkins, the Chairman had personally participated on behalf of Hughes in a United States District Court proceeding that involved an issue closely related to an issue that was being addressed as a part of the Commission's rulemaking.

The Chairman's recusal from the DBS proceeding, however, did not, as suggested by your letter, give rise to a need for him to recuse himself from all proceedings involving Hughes or other Latham & Watkins clients. Similar circumstances do not exist in the LMDS rulemaking, as the Chairman has not previously personally represented clients concerning any issues that will be considered in this rulemaking. Because this is a broad rulemaking, involving over eighty commenters, the type of proceeding routinely considered a general rulemaking, a recusal is clearly not contemplated by the OGE regulations.

Finally, your reference to the two-year cooling off period contained in 5 C.F.R. Section 2635.503 is not relevant to this case since it applies only to officials who received extraordinary payments from their former employers. The Chairman received no such payments.

For the above reasons, it remains our opinion that there is no reason for the Chairman to consider recusing himself in this proceeding.

Sincerely,

William E. Kennard
Designated Agency
Ethics Official

cc: Chairman Reed E. Hundt
LMDS Record

Patrick Carney:AL:OGC

cc: File, Reading File, GC, Attorney File, Sheldon Guttmann, Susan Steiman, Lawrence Schaffner, Suzanne Tetreault, David Solomon, Chris Wright, Bill Kennard-FYI

Academic Component Institutions:
The University of Texas at Arlington
The University of Texas at Austin
The University of Texas at Brownsville
The University of Texas at Dallas
The University of Texas at El Paso
The University of Texas-Pan American
The University of Texas of the Permian Basin
The University of Texas at San Antonio
The University of Texas Institute of Texan Cultures at San Antonio
The University of Texas at Tyler

Health Component Institutions:
The University of Texas Southwestern Medical Center at Dallas
The University of Texas Medical Branch at Galveston
The University of Texas Health Science Center at Houston
The University of Texas Health Science Center at San Antonio
The University of Texas M.D. Anderson Cancer Center
The University of Texas Health Center at Tyler

THE UNIVERSITY OF TEXAS SYSTEM
Office of General Counsel
201 WEST SEVENTH STREET AUSTIN, TEXAS 78701-2981
TELEPHONE (512) 499-4462
FAX (512) 499-4523

J. Robert Giddings
Attorney

January 9, 1995

Honorable Reed Hundt
Chairman
Federal Communications Commission
1919 M Street N.W., Room 814
Washington DC 20554

DELIVERY VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT NO. P-866-831-910

Re: **The University of Texas - Pan American; LMDS Technology**

Dear Mr. Chairman:

I received a response to my letter to you dated November 18, 1994, from William E. Kennard, the General Counsel and designated FCC Ethics Official, stating that your continued involvement in both the rulemaking and the adjudicatory aspects of the various LMDS proceedings currently in progress would not violate the ethical rules promulgated by the Office of Government Ethics as published in 5 C.F.R. Parts 2634 - 2641. The University believes that Mr. Kennard's response to its request for your recusal is inadequate.

Your continued participation in the LMDS proceedings is totally at odds with the view you have taken towards recusal in a number of other proceedings involving Latham & Watkins clients. As recently as December 15, 1994, which is ironically the same date as Mr. Kennard's letter, you voluntarily recused yourself from a Direct Broadcast Satellite rulemaking proceeding involving your former client, Hughes. The legal basis for your recusal from the DBS rulemaking proceeding involving Hughes (your former professional relationship with Hughes while you were at Latham & Watkins) warrants a similar recusal from the LMDS proceeding where Hughes has such an obvious interest.

Mr. Kennard's letter recognizes that there are adjudicatory aspects to the LMDS rulemaking proceedings since a specific, limited group of interested parties proposing different services are competing for the right to use the 28 GHz spectrum. Even the rulemaking aspect of the LMDS proceedings would appear to be a "particular matter involving specific parties" which would warrant your recusal. See 5 C.F.R. Section 2635.502(a).

The current federal regulations provide that the cooling off period for federal employees can extend to two years under certain circumstances. See 5 C.F.R. Section 2635.503. Mr. Kennard's reliance upon the November 30, 1994 expiration of a one-year cooling off period appears to be irrelevant. The LMDS rulemaking has been in progress for several years. If there was a conflict during the period November 30, 1993 to November 30, 1994, the appearance of a conflict still exists. If it would have been improper to participate in an ongoing rule-making and adjudicatory proceeding during that period of time, participation at this time will still appear to be improper.

The University has tried to treat the issues raised by your continued participation in the LMDS proceedings in an informal manner, rather than seeking a formal advisory opinion from the Office of Government Ethics as provided by 5 C.F.R. Sections 2638.301 et seq. Ms. Karen Brinkmann, a former professional colleague at Latham & Watkins and the member of your staff responsible for LMDS, was previously notified by telephone of the need for your recusal several weeks prior to my November 18, 1994 letter, which was received by your office on November 21, 1994. Thus, the University's concern about the appearance of a conflict of interest created by your participation in the LMDS proceedings was timely raised, both informally and formally, prior to the expiration of a one-year cooling off period. If the November 30 date was truly dispositive, then you would not have found it necessary to recuse yourself from the Commission's December 15 vote in the DBS rulemaking proceeding involving Hughes.

The reference in Mr. Kennard's letter to Hughes as merely "a commentator in the LMDS proceeding" appears to be a disingenuous characterization of the actual facts. To several members of the LMDS/FSS 28 GHz Negotiated Rulemaking Committee, including the University of Texas - Pan American representative, Hughes was a dominant FSS proponent which, along with Teledesic, spearheaded the FSS opposition to finding frequency - sharing solutions with the LMDS and MSS interests for the future use of the 28 GHz band.

In addition, Hughes has participated in another LMDS proceeding (Application of CellularVision of New York, L.P.; F.C.C. File No. 1-CF-P-94) wherein Hughes has opposed the deployment of LMDS in New York, the only market in the United States where LMDS has been commercially licensed. The behavior of Hughes in opposing co-frequency sharing with LMDS and opposing the deployment of LMDS in New York City creates the impression that their real interest is protecting their DBS market-share from the potential nationwide competition that LMDS would provide in service areas without existing wired-cable infrastructure. The University would like to encourage the F.C.C. to foster competition and to discourage anti-competitive behavior in the allocation of the future uses of the 28 GHz spectrum among the various LMDS, FSS and MSS interests seeking to use this frequency.

The precedent created by your prior recusals involving Latham & Watkins clients, including your most recent recusal in a Hughes-related proceeding on December 15, 1994 was very appropriate and mandates your recusal in all LMDS matters involving Hughes. The University of Texas System reiterates its prior request that you and your staff exercise your option of recusal from all matters involving LMDS and Hughes in order to preserve the integrity of the rulemaking process regarding the new LMDS technology. The University of Texas - Pan American views this new technology as essential to its participation in the Information Superhighway through distance learning in the Rio Grande Valley of Texas.

Very truly yours,

J. Robert Giddings

JRG:pm

xc: The LMDS Rulemaking Record

William E. Kennard, Esquire
General Counsel
Federal Communications Commission

Reading File

Federal Communications Commission
Washington, D.C. 20554

December 15, 1994

Mr. J. Robert Giddings
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

Dear Mr. Giddings:

Your letter to Chairman Reed E. Hundt has been referred to this office for response. You have requested that the Chairman recuse himself from the LMDS 28 GHz rulemaking proceeding, CC Docket No. 92-297. Your request appears premised solely on the fact that Latham and Watkins, the Chairman's former law firm, represents Hughes Space and Communications, a commenter in the LMDS proceeding.

Certain Office of Government Ethics (OGE) rules directly address an employee's participation in pending adjudicatory-type matters in which either his/her former firm or former clients are parties or represent parties. See 5 C.F.R. § 2635.502(b)(iv). Under these rules, an employee should consider recusal for a period of one-year after the date the employee last served his former firm or clients. These rules, however, do not contemplate that an employee consider recusal from participating in a general rulemaking. For the most part, the LMDS proceeding is such a general rulemaking. In addition, even if the proceeding involved adjudicatory-type issues, the Chairman's one-year cooling off period for recusal from Latham & Watkins matters expired November 30, 1994. Therefore, absent some unique circumstances, of which we are unaware, there is no reason that the Chairman needs to consider recusing himself from the general rulemaking or the adjudicatory aspects of this proceeding.

Sincerely,

William E. Kennard
Designated Agency
Ethics Official

cc: Chairman Reed E. Hundt
LMDS Record

UNITED STATES GOVERNMENT

memorandum

DATE: May 12, 1994

REPLY TO
ATTN OF: William E. Kennard
General Counsel

SUBJECT: Participation in Program Access Reconsideration Proceeding

TO: Merrill Spiegel
Special Assistant to the Chairman

You requested clarification of an issue raised in our memorandum to the Chairman of April 20, 1994, concerning his recusal from a portion of the Cable Program Access Rulemaking proceeding. Our recommendation that he not participate in resolving the exclusive contract issue raised in this proceeding applies only to this reconsideration proceeding, for the reasons explained below.

The exclusive contract issue involves an interpretation of the Cable Act of 1992. The National Rural Telecommunications Cooperative (NRTC) contends that the Cable Act prohibits exclusive contracts for programming between vertically integrated satellite cable or broadcast programming vendors in areas unserved by cable operators and all distributors, not just cable operators. In the rulemaking, the Commission limited the prohibition only to cable operators. DirecTv, a subsidiary of Hughes Communications, Inc., agrees with the NRTC's position. United States Satellite Broadcasting (USSB), a subsidiary of Hubbard Broadcasting, Inc. and a major competitor of DirecTv, has a number of exclusive contracts for DBS programming with HBO and Viacom and opposes the NRTC's construction of the Cable Act.

The issue raised by the NRTC, and on which opposing positions have been taken by USSB and DirecTv, is a discrete part of the rulemaking. In addition to the exclusivity issue, the other issues presented in petitions for reconsideration or petitions for clarification include:

(1) the Commission's authority to award damages for violations of the antidiscrimination or exclusivity regulations;

(2) the appropriate standard for ownership attribution and whether a programmer must be vertically integrated in order to meet that standard;

(3) whether the program access rules should apply to limited marketing and technology experiments or demonstrations;

(4) whether additional protection for proprietary or confidential information in complaint cases should be given;

(5) whether a showing of harm should be required in order to seek redress under the program access rules;

(6) whether distributor cost may be considered in justifying price differentials in discrimination cases;

(7) whether the discrimination rules should apply to existing

contracts;

(8) whether the Commission's subdistribution regulations apply only to exclusive subdistribution agreements;

(9) what the appropriate burden of proof is in price discrimination cases involving similarly situated distributors;

(10) whether certain types of programming (such as minority-owned or educational programming) should be exempt from the program access requirements;

(11) requests for clarification of the factual allegations required from complainants and of the definition of "competing distributor" for purposes of the discrimination provisions; and

(12) whether additional requirements for favorable treatment of buying groups should be imposed.

Because the exclusive contract issue is distinct, it is possible for the Chairman to recuse himself from this aspect of the proceeding without recusing himself from the other questions presented.

This morning, we learned that the Chairman's involvement in the federal court proceeding was limited to eight hours of office consultation with other attorneys over a two-day period. We understand that these hours of consultation concerned consent decrees generally. Normally, this type of consultation does not rise to the level of "personal and substantial involvement" which would require the Chairman's recusal. However, because of the contentious nature of the issue and the fact that an appearance of conflict of interest has been raised by one of the parties, it would not be inappropriate for the Chairman to refrain from participating in resolving the question about the exclusive contracts raised in the NRTC petition for reconsideration.

cc: Blair Levin

UNITED STATES GOVERNMENT

memorandum

DATE: April 20, 1994

REPLY TO
ATTN OF: William E. Kennard
General Counsel

SUBJECT: Participation in Program Access Reconsideration Proceeding

TO: Reed E. Hundt
Chairman

You have asked our office for advice regarding the propriety of your participation in the Cable Program Access Rulemaking proceeding that is now pending before the Commission on reconsideration. For the reasons set forth below, we recommend that you not participate on the exclusive contract issue in this proceeding, unless specifically authorized to participate by an agency ethics official. We see no reason for you to recuse yourself from other aspects of the proceeding.

One significant issue in the proceeding is whether DBS operators should be permitted to enter into exclusive programming arrangements with certain programming vendors. One of the major commenting parties opposed to such arrangements is DirecTv, a subsidiary of Hughes Communications, Inc., and a client you represented while at Latham & Watkins, your former law firm. Hughes is currently represented by Latham & Watkins in the reconsideration proceeding. One of the major commenting parties in favor of such exclusive contract arrangements is United States Satellite Broadcasting Company, Inc. (USSB) (a Hubbard company). In fact, USSB has entered into exclusive programming arrangements of the type opposed by Hughes. The dispute between Hughes and USSB over these exclusive programming contracts was also at issue in proposed consent decrees filed before the United States District Court (S.D.N.Y.). Your former law firm represented Hughes in that matter and it is our understanding that you may have provided some counsel to Hughes in connection with the federal court proceeding. We understand that you did not participate in this matter before the FCC.

The new Office of Government Ethics rules offer no specific guidance regarding the circumstances under which recusal from participating in a general rulemaking is advisable.[1] The standard to be applied is whether the circumstances here would cause a reasonable person with knowledge of the relevant facts to question your impartiality in the matter. See 5 C.F.R. §2635.101(b)(14); 502(a)(2). For many years, we have advised employees not to participate in any matter in which they have personally and substantially

---

[1]If this were an adjudicatory proceeding, you would be recused because of the involvement of your former client and former law firm. The resolution of the programming exclusivity issue is arguably more in the nature of an adjudication because of its potential immediate affect on the USSB contracts. In our opinion, however, we think this matter is better viewed as a rulemaking issue because its resolution will have broad applicability. There will be no determination regarding the specifics of the USSB arrangements.

participated before becoming a government employee. This prior involvement raises, in our opinion, a presumption of partiality with respect to the exclusive contract issue. Because of your prior involvement, we think a reasonable person would have cause to question your impartiality concerning this issue.[2] We therefore recommend that you recuse yourself from participating on this one issue.

cc: Blair Levin
Merrill Spiegel

---

[2]We call to your attention that USSB points out in an ex parte filing that you represented Hughes recently with respect to a contractual claim of USSB concerning whether a customer of Hughes, NRTC, could limit its customers to receiving NRTC-distributed programming only. Although this dispute is not over the programming contracts, USSB is calling attention in the docket to your former relationship with Hughes.